duty is simply that of an *operative: Farwell* v. *B. & W. Railroad Co.*, 4 Metc. 49; *Gilman* v. *Eastern Railroad Co.*, *supra*; *Zeigler* v. *Day*, 123 Mass. 152; *Crispin* v. *Babbitt*, 81 N. Y. 516; *McCosker* v. *L. I. Railroad Co.*, 84 Id. 77; *Harvey* v. *Railroad Co.*, 88 Id. 481; *Slattery's Adm'r* v. *Railroad Co.*, 23 Ind. 81; Moak Eng. Rep. 340, 342; *Flynn* v. *Salem*, 134 Mass. 351. As it would seem, then, that there is nothing to take the station agent in this instance out of the category of a *prima facie* fellow-servant of the plaintiff, we are of opinion that the court below was right in holding him to be such fellow-servant and dismissing the action accordingly.

The order refusing a new trial is accordingly affirmed.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

SUPREME COURT OF ARKANSAS.[2]

SUPREME COURT OF GEORGIA.[3]

SUPREME COURT OF KANSAS.[4]

SUPREME COURT COMMISSION OF OHIO.[5]

SUPREME COURT OF OHIO.[6]

ABATEMENT.

Actions for Penalties unaer Acts of Congress—Death of Defendant.—At common law actions on penal statutes do not survive, and there is no Act of Congress which establishes any other rule in respect to actions on the penal statutes of the United States. The nature of penalties and forfeitures imposed by Acts of Congress cannot be changed by state laws, and therefore state statutes allowing suits on state penal statutes to be prosecuted after the death of the offender, can have no effect on

[1] Prepared expressly for the American Law Register, from the original opinions. The cases will probably appear in 110 U. S.

[2] From B. D. Turner, Esq., Reporter; to appear in 41 Ark. Reports.

[3] From J. H. Lumpkin, Esq., Reporter; the cases will probably appear in 68 or 69 Georgia Reports.

[4] From A. M. F. Randolph, Esq., Reporter; to appear in 31 Kansas Reports.

[5] From E. L. DeWitt, Esq., Reporter; to appear in 40 Ohio St. Reports.

[6] From E. L. DeWitt, Esq., Reporter; to appear in 42 Ohio St. Reports.

suits in the courts of the United States for the recovery of penalties imposed by an Act of Congress: *Schreiber* v. *Sharpless*, S. C. U. S., Oct. Term 1883.

AGENT.

Powers of — Limited by scope of Employment — Agency — How proved.—It cannot be presumed, in the absence of evidence, that a local station agent along the line of a railway company has any general authority to contract for furnishing cars to shippers at other stations than his own: *Mo. Pac. Railway Co.* v. *Stats & Neiswender*, 31 Kan.

Agency cannot be proved by proof of the oral declarations of the supposed agent himself: *Id.*

Railway companies are not responsible for the declarations or admissions of any of their servants beyond the immediate sphere of their agency and during the transaction of the business in which they are employed: *Id.*

APPEAL.

Final Decree, what not.—A decree in favor of the plaintiff for the title and possession of land and improvements, and ordering a reference to a master to ascertain the necessity and value of repairs put upon them by the defendant, for which he claims compensation, is not a final decree from which an appeal can be taken: *Fitzpatrick* v. *Phillips*, 41 Ark.

ARBITRATION.

Conclusiveness of Award—Merger of Claim in the Award.—An award, though made upon a mere common-law arbitration, is *prima facie* conclusive between the parties as to all matters submitted to the arbitrators, and such award is generally a bar to an action on the original claim, and this notwithstanding defendant has failed to comply with its requirements. Arbitrations ought to be encouraged, and an award of arbitrators if unimpeached for fraud or mistake should be sustained: *Groat* v. *Pracht*, 31 Kan.

Where the plaintiff's claim is simply for money due for materials and labor on a building of the defendant, and it appears that the matters in respect to such building were submitted to arbitrators who made an award, that defendant give a check for a certain amount, surrender a certain note, and receipt two accounts one against the plaintiff and one against his father-in-law. *Held*, that whatever exceptions may exist to the general doctrine of the merger of a claim in an award this is not one, and that such award is a bar to an action on the original claim: *Id.*

ASSIGNMENT. See *Limitations, Statute of.*

ATTACHMENT.

Exemption Law no extra-territorial force—Debt of Garnishee to non-resident bound by attachment though contracted out of State—Wages.—The laws of a state, and in this are included its exemption laws, have no extra-territorial force: *Burlington & Mo. River Railroad* v. *Thompson*, 31 Kan.

To garnishee proceedings in the courts of this state, it is no sufficient

answer that the debt of the garnishee to the defendant is by the laws of the state where both defendant and garnishee reside exempt from seizure under such process: *Id.*

A foreign corporation coming into this state and leasing property and doing business here may be garnished for a debt due to one of its employees, although such employee is not a resident of this state and although the debt was contracted outside of the state: *Id.*

Where at the time of service of garnishee process the defendant is in the employ of the garnishee and continues thereafter in such employment, the garnishee proceedings bind only the amount due at the date of the service of process and do not reach to amounts subsequently earned, even under a prior contract of employment: *Id.*

Bills and Notes.

Negotiability of Note, not destroyed by waiver of Exemption, &c—Presumption that Endorsement without date was before Maturity and to bona fide Holder.—The mere incorporation in a note otherwise negotiable of a waiver of all relief from appraisement, stay, exemption and homestead laws, does not destroy its negotiability: *Lyon* v. *Martin*, 31 Kan.

Where a negotiable note appears properly endorsed by the payee and the endorsement is without date, the presumption of law is that it was so endorsed before maturity, and that the plaintiff in an action thereon is a *bona fide* holder, and this presumption is not overthrown by matters which at best do no more than create a suspicion; as for instance that the counsel of the plaintiff is also the counsel of the payee in other actions, that the general collecting agent of the payee is a witness for plaintiff on the trial, there being no showing as to how he came to be a witness or that he was not regularly subpœnaed, or that the plaintiff when he endorsed the note to a bank for collection waived protest both for himself and the payee: *Id.*

Execution of Note by Person able to Read.—Evidence—Comparison of Handwriting—Note made to Fictitious Firm.—Where a party in full possession of all his faculties and able to read, though slowly and with difficulty, signs a negotiable promissory note under the belief that it is an instrument of a different character, and does so without himself reading the instrument but relying on the reading and representations of a stranger; *held*, that the execution of the note under these circumstances is such negligence on his part as will hold him liable thereon to a *bona fide* holder: *Ort* v. *Fowler*, 31 Kan.

One who has for a considerable time been engaged in a business which necessitates the frequent comparison of handwriting, and who shows that he has been in fact in the habit of making such comparisons, is qualified as an expert to testify as to the genuineness of a disputed signature by comparison with others admitted to be genuine: *Id.*

Where a party executes a note to the order of a fictitious firm, and thereafter the holder endorses the note in the firm's name, a *bona fide* endorsee may recover against the maker and this notwithstanding the latter was ignorant of the fact that the firm name was fictitious. *Id.*

Where the principal negligence charged against the defendant is the failure to read the instrument which he signed, when he had the ability to read, proof of the latter fact is important, and a practical test

by handing him certain instruments and asking him to read them before the jury is both satisfactory and proper: *Id.*

Joint Note of Husband and Wife—Necessity of Personal Demand—Effect of Provision in Mortgage that all of a Series of Notes shall come due on Default in Payment of One.—The joint note of husband and wife is the valid obligation of the husband alone, although the wife is not liable at law thereon: *McClelland* v. *Bishop*, 42 Ohio St.

Where such a note is payable at a future time, but at no particular place, and the husband after making the same, abandons his place of residence, and deserts to some place unknown to the holders, which they cannot after diligent inquiry ascertain, when it falls due, they are excused from making a personal demand upon him: *Id.*

In such a case, a personal demand on the wife, with due notice of non-payment to the indorser, is the exercise of due diligence, and the indorser is liable, though there was no personal demand on the husband: *Id.*

Where there is a series of negotiable notes in the usual form, for distinct sums of money, payable at distinct and specified times in the future, with a mortgage to secure each, according to its tenor and effect, which contains a stipulation that if default be made in the payment of any one, "then each and all should fall due, and this mortgage to become absolute as to all said notes remaining unpaid at the happening of such default." *Held*, that such stipulation relates to the remedy by foreclosure or other proceedings under the mortgage, and upon such default the mortgage may be foreclosed for the whole debt. It is a stipulation for the advantage of the mortgagee, and of full force as to a remedy on the mortgage, but does not operate to vary or extinguish the obligations expressed on the face of the notes themselves for general purposes: *Id.*

For the purpose of demand and notice to charge indorsers, such notes are to be deemed as due according to their terms, irrespective of such stipulation in the mortgage: *Id.*

CONFLICT OF LAWS. See *Attachment.*

CONTRACT.

Consideration—Promise to Contribute to pay Indebtedness of Charity not Binding.—The creation of a fund with which to pay an indebtedness of an educational institution is not a sufficient consideration for a promise to contribute its amount to that object: *Johnson* v. *Trustees of Otterbein University*, S. C. Com. 40 Ohio St.

Therefore, where a party gave to an educational institution his note for the sum of $100, payable three years after date, and stipulating therein that the money was to be used exclusively to liquidate its then existing indebtedness: *held*, that the same was without consideration: *Id.*

An authority in the charter of the institution providing that its trustees "may procure funds for the endowment of professorships, the erection of buildings * * * the purchase of lands * * * and for whatever may be necessary for the prosperity of the institution, and shall faithfully apply what they shall receive by donation or otherwise to these purposes; provided that all donations, bequests, &c., shall be applied in accordance with the designs expressed by the donors" does

not convert the note above described and its acceptance into a case of mutual promises, nor otherwise make it valid: *Id.*

The Ohio Wesleyan Female College v. *Love's Ex'rs*, 16 Ohio St. 20, cited and distinguished: *Id.*

CONSTITUTIONAL LAW. See *Copyright.*

Law not Embracing more than one Subject and Expressing same in Title.—The constitution of a state provided that "no private or local law which may be passed by the general assembly shall embrace more than one subject, and that shall be expressed in the title." An act, the title of which was "An act to amend the charter of the Cairo & St. Louis Railroad Company," legalized an election previously held, at which the people voted in favor of a subscription to the stock of that company, and granted authority to issue bonds in payment of such subscription. *Held*, that this provision of the act was sufficiently covered by the title: *City of Jonesboro* v. *Cairo & St. L. Railroad Co.*, S. C. U. S., Oct. Term 1883.

Power of Congress to make Treasury Notes a Legal Tender.—Congress as the legislature of a sovereign nation, being expressly empowered by the Constitution "to lay and collect taxes, to pay the debts and provide for the common defence and general welfare of the United States," and "to borrow money on the credit of the United States," and "to coin money and regulate the value thereof and of foreign coin;" and being clearly authorized, as incidental to the exercise of those great powers, to emit bills of credit, to charter national banks, and to provide a national currency for the whole people, in the form of coin, treasury notes, and national bank bills; and the power to make the notes of the government a legal tender in payment of private debts being one of the powers belonging to sovereignty in other civilized nations, and not expressly withheld from Congress by the Constitution; it follows that the impressing upon the treasury notes of the United States the quality of being a legal tender in payment of private debts is "necessary and proper for carrying into execution the powers vested by the Constitution in the government of the United States." The expediency of issuing such notes at any particular time, in war or in peace, is a political question to be decided by Congress: *Legal Tender Cases*, S. C. U. S., Oct. Term 1883.

CONTRACT.

Stipulation for Release in Case of Untrue Statement.—A stipulation in a contract, made by parties uninfluenced by mis-representation or fraud and with full knowledge, that one party shall be absolutely released in case a statement made by the other shall be found to be not in all respects true, is valid, and must be enforced, where it does not affirmatively appear that the party making said statement, with reason, believed it to be true: *Peniston* v. *Ins. Co.*, S. C. Com. 40 Ohio St.

Agreement on Sufficient Consideration to pay Money to Third Person can be Enforced by him.—An agreement made on a valid consideration by one person with another, to pay money to a third, can be enforced by the latter in his own name; and the facts that the instrument

evidencing such agreement is under seal, and that such third person is not named therein, do not affect the right to enforce it: *Emmitt* v. *Brophy*, 42 Ohio St.

Where a bridge company, owning a toll bridge, sells it, under authority of law (66 Ohio L. 22, 338), to the commissioners of a county for a consideration, in money, paid to a controlling stockholder of the company, who, to induce, and as part consideration of, the purchase, gives his bond for the use and benefit of the county, conditioned, among other things "to pay off all liens and debts, whether in judgment or otherwise, existing against said bridge," a judgment creditor of the company who had an execution lien upon the bridge at the date of the bond, may recover the amount of his judgment thereon against the obligor: *Id.*

Independent Covenant—Concurrent Conditions—Agreement as to Party Wall.—Where one agreed to build a party wall resting half upon his own land and half upon the land of an adjoining land owner, furnishing the material and labor therefor, and such adjoining land owner agreed that upon its completion he would pay one-half of the cost thereof, and should own a joint interest therein and have the right to use it whenever he desired to build upon his own land; and as the land of the adjoining owner did not extend as far north as the wall, it was agreed that the party erecting it should convey to him the small strip of land lying northward of where his line terminated, such contract was absolute and not conditional; the covenants therein were independent, and the breach of one did not relieve from the obligation of another, therefore a conveyance by the party building the wall was not a condition precedent to the enforcement of his claim against the adjoining owner for his proportion of the cost thereof: *Ensign* v. *Sharp*, 68 or 69 Ga.

In case of concurrent conditions, to be simultaneously performed, if one party is ready and willing, and offers to perform, and the other will not, the first is discharged from the performance of his part and may maintain an action against the other: *Id.*

COPYRIGHT.

Photographs—Constitutional Law.—Under article 1, sect. 8, of the Constitution of the United States, empowering Congress to secure to "authors and inventors the exclusive right to their respective writings and discoveries," the copyrighting of photographs, so far as they are representatives of original intellectual conceptions of the author, can properly be authorized; and they are such when the artist has posed his subject and arranged the draperies, &c., so as to produce a distinct effect: *Burrow-Giles Lithographic Co.* v. *Sarony*, S. C. U. S., Oct. Term 1883.

CORPORATION.

Designation of Agent in Certificate filed to entitle Foreign Corporation to do Business in a State.—The Constitution of Colorado provides that "no foreign corporation shall do any business in this state without one or more known places of business, and an authorized agent or agents in the same, upon whom process may be served." The statutes of the state provide that "foreign corporations shall, before they are authorized

or permitted to do any business in this state, make and file a certificate * * * designating the principal place where the business of such corporation shall be carried on in this state, and an authorized agent or agents in this state, residing at its principal place of business, upon whom process may be served." A certificate was filed, stating "that the general manager of said corporation, residing at the said principal place of business, is the agent upon whom process may be served." *Held*, that the designation of the "general manager" was sufficient, without specifying the person who happened, at the date of the certificate, to fill that position: *Goodwin* v. *Colorado Mortgage Co.*, S. C. U. S., Oct. Term 1883.

Issue of Stock beyond the Charter Limit—Action on Subscription to such Stock.—Where a corporation, incorporated under the laws of Alabama, was only authorized by its charter to issue stock to the amount of $100,000, when stock to that amount had been issued its charter power was exhausted; and stock issued beyond that amount was *ultra vires* and void, and a subscription therefor could not be collected by the corporation, or by the assignees thereof occupying the place of such corporation: *Clark* v. *Turner*, 68 or 69 Ga.

If one who subscribed to the stock of an insurance company, after its charter power of issuing stock had been exhausted, induced insurance on the part of any other person, in that company, by his acts as trustee or agent thereof, or on the faith of his subscription, an individual action on the part of the person so induced would lie against him, but not an action by the company or its assignee for his subscription: *Id.*

EJECTMENT.

Title from Common Source—Presumption of Priority.—Where the source of title is identical, and the parties have no other title to rely on, neither party can go behind the person from whom they hold, or show that his claim is not good: *Stafford et al.* v. *Watson*, 41 Ark.

Where a complaint in ejectment alleges that the defendant claims title by mesne conveyance from the plaintiff's grantor, and the answer admits that the defendant has no source of title beyond the common grantor, it will be presumed, in the absence of allegation and proof to the contrary, that the defendant's title is junior and subordinate to the plaintiff's: *Id.*

ELECTION. See *Will.*

ERRORS AND APPEALS.

Review of Judgments of State Court in United States Supreme Court.—In order to make a judgment of a state court reviewable in the United States Supreme Court on a federal question, it must unmistakably appear that the court below either knew, or ought to have known, that such a question was involved in the decision to be made. That the federal question was suggested on a petition for a rehearing, is insufficient; as the jurisdiction of the United States Supreme Court extends only to a review of the judgment as it stands in the record, and they cannot incorporate into the record any new matter which appears for the first time after the judgment on a petition for a rehearing: *Susquehanna Boom Co.* v. *W. Branch Boom Co.*, S. C. U. S., Oct. Term 1883.

EVIDENCE. See *Bills and Notes.*

EXECUTION. See *Mortgage.*

EXEMPTION. See *Attachment.*

EXPERT. See *Bills and Notes.*

HOMESTEAD.

Tenant in Common and his Widow and Heirs entitled to.—A tenant in common is entitled to a homestead, exempt from execution, in the common estate, and on his death the right descends to his widow and heirs: *Ward* v. *Mayfield,* 41 Ark.

INFANT. See *Negligence.*

LIBEL.

Statements made in Good Faith as to Character of Candidates for Public Office Privileged.—In a criminal prosecution for libel, evidence was introduced tending to show that the defendant, who was an elector of Chase county, Kansas, circulated an article among the voters of such county containing some things that were untrue and derogatory to the character of the prosecuting witness, who was then a candidate for the office of county attorney of said county. *Held,* that if the supposed libellous article was circulated among the voters of Chase county, and only for the purpose of giving what the defendant believed to be truthful information, and only for the purpose of enabling such voters to cast their ballots more intelligently, and the whole thing was done in good faith, such article was privileged and the defendant should be acquitted, although the principal matter contained in the article may have been untrue, in fact, and derogatory to the character of the prosecuting witness: *State* v. *Balch,* 31 Kan.

LIMITATIONS, STATUTE OF.

Municipal Corporation subject to.—Municipal corporations are bound as individuals are, by the Statute of Limitations; and an adverse possession of an alley in a city for the statutory period, will give title to the occupant and bar the city: *City of Fort Smith* v. *McKibbin,* 41 Ark.

Bar of by reason of Infancy—Burden of Proof.—When the Statute of Limitations is pleaded, and adverse possession for the period of the statutory bar is shown in an action of ejectment brought by one who has recently attained to majority, the burden is on him to prove that the action was commenced within three years from his majority: *Yell* v. *Lane,* 41 Ark.

Payment on account by Assignee for Benefit of Creditors when sufficient to bar.—Where the maker of a note thereafter made an assignment for the benefit of creditors, and in such assignment scheduled this note, and directed his assignee to convert the assigned property into money and pay his debts, and in pursuance thereof the assignee took possession and converted said property into money, and applied the same in part payment of the assignor's debts, this note among the number,

Held, that the payment being one made in pursuance of express directions from the assignor, for his benefit, and out of the proceeds of his property, is such a payment as, under sect. 24 of the code, avoids the bar of the Statute of Limitations; and this notwithstanding the proceedings under the assignment are controlled by the provisions of a general statute concerning assignments for the benefit of creditors: *Letson* v. *Kenyon*, 31 Kan.

Mandamus.

When it lies against a Public Officer.—Where a public officer is called upon to perform a plain and specific public duty positively required by law, ministerial in its nature, calling for the use of no discretion, nor the exercise of official judgment, his performance of such duty may, upon his refusal and in the absence of other means of relief, be enforced by mandamus: *State ex rel. Ins. Co.* v. *Moore*, 42 Ohio St.

When such officer, in determining upon the performance of a public duty, is called upon to use official judgment and discretion, his exercise of them, in the absence of fraud, bad faith and abuse of discretion, will not be controlled or directed by mandamus: *Id.*

Master and Servant. See *Railroad.*

Accident on account of known Defect — Negligence.—Where the step of a railroad engine is slightly defective, and the conductor of the train has full knowledge of the condition of such step, and continues to use it, he cannot recover damages from the railroad company for injuries, claimed to have resulted from the defective condition of the step, received by him while using it: *Jackson* v. *Railroad Co.*, 31 Kan.

The reversal of an engine in switching and in making up trains, is not negligence *per se*, and negligence is never presumed without proof; but in all cases must be proved: *Id.*

Mortgage.

Chattel Mortgage—What Designation of Articles Necessary.—A mortgage of a specified number of articles out of a larger number, will not be good against creditors of the mortgagor and others acquiring adverse rights, unless it furnishes the data for separating the mortgaged part from the mass: *Dodds* v. *Neel*, 41 Ark.

In 1879 N. conveyed to B. a farm for $5610, payable in six equal annual instalments. B. then conveyed the land and ten bales of each annual crop of cotton to be produced on it for the six years, to a trustee to secure the payments, with power to take possession and sell on default of payment. In 1881 N. took possession of ten bales, including three made by a tenant to B., to pay the instalment for that year. The tenant had mortgaged his whole crop of that year to D. for supplies. *Held*, That the first mortgage was void for uncertainty as against D., the second mortgagee, and he could maintain replevin against N. for the three bales: *Id.*

Chattel Mortgage—Lien of when not properly filed—Private Sale of Chattel by Sheriff.—H. held a chattel mortgage from P. on a quantity of growing wheat. The mortgage was not filed with the clerk of the

township where P. resided. S. and others, judgment creditors of P., caused executions to be levied upon the wheat, knowing that H. had a chattel mortgage thereon. The sheriff who held the wheat under his levies, after it was harvested and threshed, agreed with C. to sell it to him, to be paid for in cash on delivery; and afterward delivered it to C. in pursuance of his agreement. The sale by the sheriff was made with the consent and at the request of the execution creditors; but without an order from the court or a judge thereof to sell at private sale, and, on the day of delivery, before C. had paid for the wheat, H. seized it in replevin under a provision in his mortgage. *Held*, 1. That the lien created by the levies was superior to the lien of the mortgage. 2. That the delivery of the wheat to C. by the sheriff under his agreement to sell, was not an abandonment of the levies: *Houk* v. *Condon*, S. C. Com. 40 Ohio St.

What is—Legal Title remains in Mortgagor.—The owner in fee of real estate conveyed the same to a trustee to secure a debt to a third person. After the granting clause to a trustee in fee, there was a condition that if the debt was paid at maturity the conveyance was to be void, otherwise the trustee was authorized to sell the land at public sale to pay the same. *Held*, 1. This conveyance was a deed of trust in the nature of a mortgage, and not an absolute conveyance in trust to secure the debt. 2. The legal title remains in the grantor or mortgagor in possession after default, subject to the right of the trustee or creditor to enforce the condition of the mortgage. 3. The fact that the conveyance is to a trustee, with power of sale in case of default, does not change its character in this respect. 4. A judgment against the grantor who remains in possession of the premises with the acquiescence of the mortgagee, after default, is a lien on said premises subject to such mortgage: *Martin* v. *Alter*, 42 Ohio St.

MUNICIPAL CORPORATION. See *Limitations, Statute of.*

Bonds of—Necessity of Signature of Clerk without discretion to withhold it when required by Statute.—A statute of the state of Kansas directed county commissioners of a county (when the electors of a township in the county should have determined, in the manner provided in the act, to issue bonds in payment of a subscription to railway stock) to order the county clerk to make the subscription, and to cause the bonds to be issued in the name of the township, signed by the chairman of the board and attested by the clerk under the seal of the county. *Held*, that the signature of the clerk was essential to the valid execution of the bonds, even though he had no discretion to withhold it: *Bissell* v. *Spring Valley Township*, S. C. U. S., Oct. Term 1883.

Liability for Bridge over Ditch in Highway.—If a municipal corporation does not use ordinary care and diligence to make or keep a bridge over a ditch in one of its highways, whether constructed by it or not, a safe and convenient crossing for those using it as a passage over the ditch both by day and night, it would be chargeable with negligence and liable for whatever damages may be sustained in consequence thereof: *Town of Belton* v. *Vinton*, 68 or 69 Ga.

NEGLIGENCE. See *Master and Servant.*

OFFICER.

Authority of one Executing Distress Warrant to receive Partial Payment.—Where a distress warrant was sued out and placed in the hands of a levying officer, he was authorized and commanded to collect it, and his authority to collect the whole included authority to collect a part of the amount. A partial payment to him discharged the defendant *pro tanto*, and the plaintiff must look to the officer for the amount so paid: *White* v. *Mandeville*, 68 or 69 Ga.

PENALTY. See *Abatement.*

PLEADING.

Default only admits Allegations of Complaint.—A default after due service of summons admits only the allegations of the complaint, and if they are insufficient to support the judgment it will be reversed: *Chaffin et al.* v. *McFadden*, 41 Ark.

PRESUMPTION.

As to Note found among Effects of Deceased Debtor.—A promissory note having been produced from among the effects of a deceased debtor by his administrator, the presumption was that it had been paid, and the onus was on the party asserting the contrary to show it: *Liddell, Adm.*, v. *Wright, Adm.*, 68 or 69 Ga.

RAILROAD. See *Agent.*

Liability for Negligence of Road Master.—A road master of a railroad company, upon whom is imposed the duty of directing the repairs of the road and keeping the road in safe condition, is, in the line of his duty, the representative of the master—the representative of the company: *Atchison, Topeka & Santa Fe Railroad* v. *Moore*, 31 Kan.

Where the road master of a railroad company, whose duty it is to direct repairs and keep the road in safe condition, is culpably negligent in the performance of his duty, the railroad company even under the rule of the common law is liable for the damages resulting from such negligence to one of its other servants or employees: *Id.*

Liability for Injury to Minor assisting his Father.—Where an employee of a railroad company, rightfully engaged in the repair of a freight car belonging to his employer, calls upon his son, a minor under eleven years of age, to render him necessary temporary assistance in the work, and the son while so assisting, without any negligence on his part or on the part of his father, is injured through the negligence of the agents and servants of another railroad company, in backing a train of cars upon a side track where the car is being repaired, the latter company is liable in an action by the son, for damages for the injury by him so received: *The Penna. Co.* v. *Gallagher*, S. C. Com. 40 Ohio St.

REMOVAL OF CAUSES.

Criminal Prosecution—When Jurisdiction of State Court Ceases.—Where a prosecution in a state court is duly removed to the circuit court of the United States, and the jurisdiction of that court attaches, the

subsequent action of the state court in forfeiting the recognisance of the defendant for his non-appearance is *coram non judice* and void; but where the case was never duly removed, and it was dismissed from the United States court on the ground that that court had no jurisdiction of the case, a forfeiture of the recognisance for non-appearance in the state court would be good. Before the jurisdiction of the state court will cease in such cases, the jurisdiction of the United States court must attach; and where the jurisdiction of the latter court never attached, that of the former was never lost: *Hunter* v. *Colquitt*, 68 or 69 Ga.

Suits founded on Contract in favor of an Assignee.—Sect. 1, Ch. 137, Act of March 3d 1875, confers upon circuit courts of the United States original jurisdiction in controversies between citizens of different states, or citizens of a state and foreign states, citizens or subjects, where the matter in dispute exceeds, exclusive of costs, the sum of $500, and further provides as follows: "Nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes, negotiable by the law merchant and bills of exchange." Section 2 of that act authorizes the removal of similar causes as to parties and amounts from state courts to circuit courts of the United States, but without imposing the restriction as to assignees and assignments. *Held*, that the restriction upon the commencement of suits contained in section 1 does not apply to the removal of suits under section 2: *Claflin* v. *Commonwealth Insurance Co.*, S. C. U. S., Oct. Term 1883.

Sale.

Necessity of Tender before Action for Breach of Contract of.—Where W. contracts with T. to sell to T. a safe in the possession and under the control of L., and contracts that L. shall deliver the same to T., and T. agrees that upon delivery thereof he will pay $15, and L. refuses absolutely to deliver the safe: *Held*, that T. may at once, and without a tender of the $15, commence an action against W. for the damage sustained by T. on account of the failure and refusal of L. to deliver the safe: *Thompson* v. *Warner*, 31 Kan.

Specific Performance.

Part Performance must be in Life of Vendor.—Part performance of a parol contract for the sale of land must be made in the life of the vendor or it will not bind his infant heirs: *Shirey* v. *Cumberhouse*, 41 Ark.

Statute.

Repeal by Implication.—Repeals by implication are not favored. To produce such result the two acts must be upon the same subject and there must be a plain repugnancy between their provisions; in which case, to the extent of the repugnancy, the latter act repeals the former. Or, if the two acts are not in express terms repugnant, then the later act must cover the whole subject of the first and embrace new provisions plainly showing that it was intended as a substitute for the first: *Coats* v. *Hill*, 41 Ark.

Tax and Taxation.

Distinction between Tax and Assessment—Exemption from Taxation does not Exempt from Assessments.—In a general sense, a tax is an assessment and an assessment is a tax; but there is a well recognised distinction between them, an assessment being confined to local impositions upon property for the payment of the cost of public improvements in its immediate vicinity, and levied with reference to special benefits to the property assessed: *City of Lima* v. *Lima Cemetery Association*, 42 Ohio.

A municipal corporation insisting on the right to impose an assessment, should be able to show that such power has been clearly granted to it by statute; but authority being shown, in general terms, to make the assessment, whoever insists that his property is exempted from the burden, will be required to support his claim by a provision equally clear: *Id.*

An incorporated cemetery association is not relieved from an assessment for a street improvement by a statutory provision exempting its lands from *taxation*, such exemption being regarded as confined to taxes as distinguished from local assessments: *Id.*

While the lands of an incorporated cemetery association, so far as exempted, cannot be sold to pay an assessment for the improvement of a street, the municipal corporation may enforce the assessment by such remedies as the statute and courts of equity afford: *Id.*

Telegraph Company.

Not Insurer—What sufficient proof of Negligence.—Telegraph companies are not insurers, and do not guarantee the delivery of all messages with entire accuracy and against all contingencies, but they do undertake for ordinary care and vigilance in the performance of their duties and to answer for the neglect and omission of duty of their servants and agents: *Little Rock & Fort Smith Telegraph Co.* v. *Davis*, 41 Ark.

When it is proved that the agent of a telegraph company received a message and failed to deliver it, and there is no proof to account for or excuse the negligence, it may be assumed to have been intentional on the part of the agent or a gross disregard of duty: *Id*

Trustee.

Contract of—When personally liable on—"Current Expenses."—Real estate and personal property were held in trust by two trustees. One trustee at the request of the other and of a third person resigned his trust without requiring previous payment of his demands against the trust estate, and the third person was appointed trustee in his place. The two trustees then executed a written agreement with the outgoing trustee, undertaking to apply to the payment of his said claims "all the moneys which shall come into our hands as trustees as aforesaid after first paying therefrom all taxes and current expenses of said property and trust:" *Held*, that this was a contract to be enforced at law, against the parties individually, and not a trust to be enforced in a court of equity; and that the current expenses of the trust did not include the construction of fire-proof buildings and unusual expenditures for protecting the property: *Taylor* v. *Davis*, S. C. U. S., Oct. Term 1883.

UNITED STATES COURTS. See *Equity; Errors and Appeals.*

Jurisdiction—Power to prevent abuse of its own Process—Citizenship.—Goods claimed by a third person having been seized on a writ of attachment issued by A. against B., in the United States court, and the remedy which the third person would have in the state courts by way of a writ of replevin against the officer executing such a process, not existing against the United States marshal, *Held*, that the United States court would, on a bill filed by the claimant, grant him full relief, although he was a stranger to the original suit and the citizenship of the parties to the bill was not such as would be necessary to give the United States court jurisdiction in an original proceeding: *Krippendorf* v. *Hyde*, S. C. U. S., Oct. Term 1883.

USURY. See *Equity.*

Effect of Novation.—An insurance company made a loan of money to W., and took from him his promissory note for the amount thereof, with interest at eight per cent. per annum, secured by mortgage on real estate, and took his sundry other notes for usurious interest on the loan. W. afterwards sold and conveyed the property to B., who, as part of the consideration, agreed to pay the notes and mortgage given by W., and, to secure the performance of his agreement, executed to W. a mortgage on the same property. B. sold and conveyed the property in fee to J., and made to him a warranty deed thereof, and agreed with him to pay off the incumbrances thereon. *Held*, that in an action of foreclosure by the insurance company, the defence of usury is not available to J. against the mortgage given by W. to the company: *Jones* v. *Franklin Ins. Co.*, S. C. Com. 40 Ohio St.

WILL.

Difference between Deed and Testament.—The test whether a written instrument is a deed or is testamentary in its character is this: If the title vests *eo instanti* at the execution of the paper, it is a deed; but if the same is not to take effect until the death of the maker, it is a testament: *Ward* v. *Campbell*, 68 or 69 Ga.

Election—Parol Evidence as to.—William Hubbard's will contained the following devise: "I give and bequeath to my brother Edward L. Hubbard, the full amount of his indebtedness to me, and the remainder of my property both real and personal to my sister Mrs. Sarah L. Fitzhugh." This debt, amounting to $4200 dollars, evidenced by note and secured by deed of trust on property, had in fact been transferred by the testator to Mrs. Fitzhugh eight months before the execution of the will, and Edward L. was not then indebted to him at all, and after his death she attempted to collect the debt. *Held*, that she should elect whether she would affirm the will and accept the devise to her, or renounce the same and hold the debt: *Fitzhugh and Wife* v. *Hubbard*, 41 Ark.

In the construction of wills parol evidence is admissible to show the condition of the subject-matter and the surrounding circumstances, so as to place the court in the position of the testator; but his purpose to put the devisee to his election must appear from the will itself. *Id.*